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1991

DEPARTMENT OF  
HEALTH AND ENVIRONMENTAL SCIENCES



STAN STEPHENS, GOVERNOR

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July 19, 1991

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HELENA, MONTANA 59620

Dear Librarian:

Subject: Draft Administrative Order on Consent and Work Plan for  
Streamside Tailings Remedial Investigation/Feasibility  
Study (RI/FS)

The Montana Department of Health and Environmental Sciences is issuing, for public review and comment, a draft Administrative Order on Consent and a draft Work Plan for the RI/FS for the Streamside Tailings operable unit of the Silver Bow Creek Superfund Site. I have enclosed copies of these documents for inclusion in your Silver Bow Creek Information Repository. Please make them available for public review as soon as possible; the public review and comment period will be open until August 23, 1991.

If you, or any of the document users, have questions about the documents or require additional information, please feel free to call me toll-free at 1-800-648-8465. Thanks for your assistance.

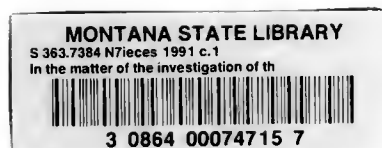
Sincerely,

*Neil Marsh*

Neil Marsh  
Silver Bow Creek Project Officer

Enclosures

PLEASE RETURN





BEFORE THE  
DEPARTMENT OF HEALTH AND ENVIRONMENTAL SCIENCES  
OF THE STATE OF MONTANA

IN THE MATTER OF:	)	REMEDIAL INVESTIGATION/
	)	FEASIBILITY STUDY
THE INVESTIGATION OF THE	)	ADMINISTRATIVE ORDER ON
ENVIRONMENTAL CONDITIONS	)	CONSENT
AT AND EMANATING FROM THE	)	
STREAMSIDE TAILINGS	)	DOCKET NO. SF-91-0001
OPERABLE UNIT OF THE	)	
SILVER BOW CREEK/BUTTE AREA	)	
NATIONAL PRIORITY LIST	)	
SITE	)	
	)	

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TO: ATLANTIC RICHFIELD COMPANY, a Delaware corporation authorized  
to transact business in the State of Montana,

Respondent.

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#### Attachments

1. Work Plan
2. Schedule
3. Federal law and regulation package
4. Form of disclaimer
5. Quality Assurance Project Plan
6. Sampling and Analysis Plan
7. Access Agreement
8. EPA Letter Regarding On Site Permit Exemption

BEFORE THE  
DEPARTMENT OF HEALTH AND ENVIRONMENTAL SCIENCES  
OF THE STATE OF MONTANA

IN THE MATTER OF:	)	REMEDIAL INVESTIGATION/
	)	FEASIBILITY STUDY
THE INVESTIGATION OF THE	)	ADMINISTRATIVE ORDER ON
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OPERABLE UNIT OF THE	)	
SILVER BOW CREEK/BUTTE AREA	)	
NATIONAL PRIORITY LIST	)	
SITE	)	

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TO: ATLANTIC RICHFIELD COMPANY, a Delaware corporation authorized  
to transact business in the State of Montana,

Respondent.

I. JURISDICTION

This Remedial Investigation/Feasibility Study (RI/FS) Administrative Order on Consent ("Consent Order") is issued pursuant to the authorities vested in the State of Montana ("State") acting by and through its Department of Health and Environmental Sciences ("DHES"), by §§ 75-10-711 and 75-10-715, Montana Code Annotated ("MCA"), and Section 107 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended by the Superfund Amendments and Reauthorization Act of 1986 ("CERCLA") (42 U.S.C. § 9607). DHES issues this Consent Order in consultation with EPA following EPA review and approval of the Consent Order and attachments thereto.

II. DEFINITIONS

Words used in this Consent Order are to be taken and understood in their natural and ordinary sense unless this Consent Order indicates that a different meaning was intended. Whenever the following terms are used in this Consent Order, or in documents incorporated herein or appended hereto, the following meanings shall apply:

A. "CECRA" means the Comprehensive Environmental Cleanup and Responsibility Act, §§ 75-10-701 through 724, MCA, including amendments to CECRA enacted by the 52nd Montana Legislature (1991 Session) when they become effective October 1, 1991.

B. "Consent Order" shall mean this document together with all attachments hereto and appendices incorporated herein. The terms of this document shall control over conflicting provisions in any appendix or attachment hereto.

C. "Contractor" shall mean the company or companies retained by, or on behalf of, Respondent to undertake and complete the Work or any part thereof. A Contractor, and any subcontractors retained by the Contractor, shall be deemed to be related by contract to the Respondent.

D. "Day" shall mean calendar Day, unless business Day is specified. Any deliverables, notices or other written documents that under the terms of the Consent Order would be due on a Saturday, Sunday or a State of Montana holiday (as identified by the Governor or by state law) shall be due on the following business Day.

E. "Dispose" or "Disposal" means the discharge, injection, deposit, dumping, spilling, leaking, or placing of any Hazardous or Deleterious Substance into or onto the land or water so that the Hazardous or Deleterious Substance may enter the environment or be emitted into the air or discharged into any waters, including ground waters.

F. "EPA" means the United States Environmental Protection Agency.

G. "Facility" means Silver Bow Creek, its present stream channel, any associated historical flood plain of Silver Bow Creek (except for that soil and groundwater contamination which (1) is specific to the Rocker Timber Framing Plant (i.e. arsenic and potential organic compounds from wood treating activities) and (2) is to be investigated in the Rocker Operable Unit RI/FS) and any railroad beds and embankments adjacent to the Silver Bow Creek floodplain, from the western boundary of the Lower Area One Operable Unit to the southern boundary of the Warm Springs Ponds Operable Unit. Portions of the Streamside Tailings Operable Unit are located within the SW 1/4 of Section 16, the S 1/2 of Section 17, the S 1/2 of Section 18, the N 1/2 of Section 19, the N 1/2 of Section 20, the N 1/2 of Section 21, the N 1/2 of Section 22, and Section 23 of Township 3N, Range 8W of the Montana Principal Meridian; the S 1/2 of Section 13, the SE 1/4 of Section 14, the S 1/2 of Section 15, Section 16, Section 17, Section 18, the N 1/2 of Section 19, the NE 1/4 of Section 21, the N 1/2 of Section 22, Section 23, and the N 1/2 of Section 24 of Township 3N, Range 9W of the Montana Principal Meridian; the W 1/2 of Section 1, the E 1/2 of Section 2, Section 12, and the NE 1/4 of Section 13 of Township 3N, Range 10W of the Montana Principal Meridian; and the S 1/2 of Section 1, the SE 1/4 of Section 2, the E 1/2 of Section 11, the W 1/2 of Section 12, the W 1/2 of Section 13, the E 1/2 of Section 14, the E 1/2 of Section 23, the W 1/2 of Section 24, the W 1/2 of Section 25, the E 1/2 of Section 26, the E 1/2 of Section

35, and the W 1/2 of Section 36 of Township 4N, Range 10W of the Montana Principal Meridian.

H. **"Fund"** shall mean the Environmental Quality Protection Fund established in § 75-10-704, MCA.

I. **"Hazardous or Deleterious Substance"** shall mean:

1. a substance that because of its quantity, concentration, or physical, chemical, or infectious characteristics may pose an imminent and substantial threat to public health, safety, welfare or the environment and is:

a) a substance that is defined as a hazardous substance by Section 101(14) of the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9601(14), as amended;

b) a substance identified by the administrator of the United States Environmental Protection Agency as a hazardous substance pursuant to Section 102 of CERCLA, 42 U.S.C. 9602, as amended;

c) a substance that is defined as a hazardous waste pursuant to Section 1004(5) of the Resource Conservation and Recovery Act of 1976, 42 U.S.C. 6903(5) as amended, including all substances listed or identified in 40 CFR 261; or

d) any petroleum product.

J. **"NCP"** means the National Oil and Hazardous Substances Pollution Contingency Plan, 40 CFR, Part 300.

K. (the) **"Parties"** collectively, shall mean the State of Montana, acting by and through DHES, and the Respondent.

L. **"Release"** means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping or disposing of any Hazardous or Deleterious Substances into the environment.

M. **"Respondent"** shall mean the Atlantic Richfield Company, a Delaware corporation, ("ARCO"). The term "Respondent" shall include ARCO's successors and assigns and all persons acting with or through ARCO's authority and in ARCO's behalf, including ARCO's officers, directors, principals, employees, and agents, in their respective capacities where such persons otherwise meet the definitions of "owners" and "operators" under CECRA.

N. **"Supplemental Work Plan"** shall mean any Work Plan to be performed under the Additional Work Section, Section XII.



O. (the) "Work" shall mean all investigations, sampling, and other mitigative actions prescribed by this Consent Order, including the Work Plan, any Supplemental Work Plans and any schedules or plans established by the terms of this Consent Order.

P. "Work Plan" means the plan to perform the Work developed jointly by the Respondent and DHES, which is attached hereto and incorporated herein as Attachment 1 to this Consent Order.

### III. FINDINGS OF FACT

The State of Montana, acting by and through DHES, has made the following Findings of Fact concerning the Streamside Tailings Operable Unit:

A. Respondent ARCO is a corporation currently organized under the laws of the State of Delaware, with its corporate headquarters in Los Angeles, California. ARCO does business in the State of Montana.

B. Silver Bow Creek is a stream that forms in the mountains near Butte, Montana. It flows southerly, westerly, and then northerly through Butte and the southern portion of the Deer Lodge Valley. Before joining Warm Springs Creek to form the Clark Fork River, Silver Bow Creek flows into the Warm Springs Ponds, which are a series of three surface water and tailings impoundments, owned and operated by ARCO, lying east of Anaconda, Montana.

C. The Streamside Tailings Operable Unit includes Silver Bow Creek, its present stream channel and associated historical floodplain, and any railroad beds and embankments adjacent to the Silver Bow Creek floodplain, from the western boundary of the Lower Area One Operable Unit to the southern boundary of the Warm Springs Ponds Operable Unit. Portions of the Streamside Tailings Operable Unit are located within the SW 1/4 of Section 16, the S 1/2 of Section 17, the S 1/2 of Section 18, the N 1/2 of Section 19, the N 1/2 of Section 20, the N 1/2 of Section 21, the N 1/2 of Section 22, and Section 23 of Township 3N, Range 8W of the Montana Principal Meridian; the S 1/2 of Section 13, the SE 1/4 of Section 14, the S 1/2 of Section 15, Section 16, Section 17, Section 18, the N 1/2 of Section 19, the NE 1/4 of Section 21, the N 1/2 of Section 22, Section 23, and the N 1/2 of Section 24 of Township 3N, Range 9W of the Montana Principal Meridian; the W 1/2 of Section 1, the E 1/2 of Section 2, Section 12, and the NE 1/4 of Section 13 of Township 3N, Range 10W of the Montana Principal Meridian; and the S 1/2 of Section 1, the SE 1/4 of Section 2, the E 1/2 of Section 11, the W 1/2 of Section 12, the W 1/2 of Section 13, the E 1/2 of Section 14, the E 1/2 of Section 23, the W 1/2 of Section 24, the W 1/2 of Section 25, the E 1/2 of Section 26, the E 1/2 of Section 35, and the W 1/2 of Section 36 of Township 4N, Range 10W of the Montana Principal Meridian.

D. During the latter part of the nineteenth century, the area in and around Butte, Montana, was recognized as one of the

major mining centers of the world. To develop the rich deposits of minerals located there, particularly of copper and silver, hundreds of mines were opened and worked. To concentrate and further smelt and refine the mine ore, various parties, including predecessors in interest to ARCO, constructed smelters, mills, and concentrators in and around Butte along the banks of Silver Bow Creek.

E. These smelters and associated operations processed hundreds of tons of ore each day and disposed of large quantities of tailings, slimes, and other wastes into and along the banks of Silver Bow Creek, which entered the creek and were carried downstream. These operations came under the ownership and control of the Anaconda Copper Mining Company ("Anaconda"), as a result of various mergers, restructurings, transfers of assets, continuations of business activity, or other corporate action between approximately 1900 and 1910. As a result of one or more mergers, restructurings, transfers of assets, continuations of business activities, or other corporate action, ARCO is the successor in interest to and has assumed the liabilities incurred by Anaconda. Anaconda was the successor in interest to the Amalgamated Copper Mining Company and its subsidiaries ("Amalgamated") which owned or otherwise controlled the operation of several major mines, mills, smelters, and other facilities in and around Butte, Montana, in the late 1800s and the early 1900s. These facilities in Butte included, but were not limited to, numerous smelters, concentrators and mills which were located adjacent to Silver Bow Creek and discharged a variety of mining wastes directly to Silver Bow Creek.

F. The wastes disposed of from the facilities described above, including wastes in ponds built near these establishments, have continued periodically to leach or wash out into Silver Bow Creek. Anaconda owned and ARCO currently owns properties from which arsenic and heavy metals from mining wastes are leaching into Silver Bow Creek. However, most of the property along Silver Bow Creek is currently owned by persons who are not parties to this Consent Order.

G. These wastes now contaminate the river beds, banks, and floodplains of Silver Bow Creek and the Warm Springs Ponds and contain elevated concentrations of arsenic and heavy metals, including but not limited to barium, cadmium, chromium, copper, lead, manganese, and zinc.

H. High stream flow events in Silver Bow Creek, including historical flood episodes and snowmelt and rainfall runoff, have previously deposited and presently reentrain and redeposit streambank tailings and contaminated sediments within and along the banks of Silver Bow Creek. During extended summer dry periods, surface buildup of highly soluble metallic salts are evident on many of the tailings deposits along the banks of Silver Bow Creek. During heavy rainfalls, surface runoff containing dissolved concentrations of these metals salts are known to enter Silver Bow Creek.

I. A major area of alluvially-deposited tailings occurs at the Ramsay Flats, which is located south and southwest of the town of Ramsay in the N 1/2 of Section 22 and the N 1/2 of Section 23 of Township 3 N, Range 9 W of the Montana Principal Meridian. Preliminary investigations at Ramsay Flats have identified elevated concentrations of arsenic and heavy metals, surface salts containing up to 15 percent (by weight) of metals, and degradation of water quality in the shallow portions of the alluvial aquifer. In addition, during high flow events, elevated concentrations of iron, arsenic, and lead have been measured in the surface water in Brown's Gulch, which flows through the western portion of Ramsay Flats.

J. Preliminary investigations have shown that the EPA 1-hour aquatic life criteria for copper and zinc are regularly exceeded in Silver Bow Creek.

K. Arsenic is a human carcinogen and cadmium is a probable human carcinogen. Arsenic and cadmium can be acutely and chronically poisonous and can be fatal if ingested or inhaled in sufficient quantities by humans, livestock, and wildlife. Arsenic and cadmium compounds are absorbed into the body primarily through inhalation or ingestion. Lead is a probable human carcinogen, and is a cumulative poison which can cause neurologic, kidney, and blood cell damage in humans. Some lead compounds are also animal carcinogens adversely affecting the lungs and kidneys. Some copper and zinc compounds are toxic at elevated levels to a number of animal species, including humans. Copper and zinc are particularly toxic to fish. Severe illness and/or death can result from excessive exposure of humans, livestock, and wildlife to toxic levels of arsenic, cadmium, lead, copper, and zinc.

L. Actual and potential routes of migration or exposure of humans and animals to arsenic, cadmium, copper, lead, zinc, and other Hazardous and Deleterious Substances that are present in the Streamside Tailings Operable Unit include direct human or animal contact with waters, soil, and sediment containing such substances; human inhalation of contaminated fugitive dust from wind transport of waste and soil particles containing such substances; migration of such substances to ground water; migration of such substances to surface water; and acute or chronic release of contaminants to the surface water.

M. Preliminary sampling results from the Montana Pole remedial investigation indicate that elevated levels of organic contaminants are present in Silver Bow Creek surface waters at the USGS gaging station located near the 1-15/90 overpass near Butte. The Administrative Order on Consent for the Montana Pole Remedial Investigation/Feasibility Study (DHES Docket No. SF-90-00001) provides that downstream investigations of that organic contamination will be investigated as part of the Silver Bow Creek NPL site.

N. Known or suspected organic contaminants of concern from the Montana Pole site include pentachlorophenol (PCP), creosote, dioxins, furans, polynuclear aromatic hydrocarbons (PAH), and diesel fuel.

O. Pentachlorophenol and creosote are Hazardous and Deleterious Substances as defined by § 75-10-701(6), MCA.

P. Dioxins and furans are constituents of pentachlorophenol and are Hazardous and Deleterious Substances as defined by § 75-10-7-1(6), MCA.

Q. Creosote contains polynuclear aromatic hydrocarbons which are Hazardous and Deleterious Substances as defined by § 75-10-701(6), MCA.

R. Diesel fuel contains toluene, xylene, benzene, and ethylbenzene, which are considered Hazardous and Deleterious Substances.

S. Pentachlorophenol can cause damage to the human liver, kidney, nervous system, and immune system with chronic exposure. PCP has been demonstrated to cause cancer in animals. Some polynuclear aromatic hydrocarbons are known carcinogens. Benzene is considered a human carcinogen.

T. Actual and potential routes of exposure to PCP, dioxin, PAH, furans, diesel fuel constituents, and other Hazardous and Deleterious Substances include direct human or animal contact through ingestion or dermal absorption of soil, sediment, surface water or ground water, and inhalation of the Hazardous or Deleterious Substance in the air.

U. The Rocker Timber Framing and Treating Site Operable Unit of the Silver Bow Creek/Butte Area NPL site is located adjacent to the Streamside Tailings Operable Unit near Rocker, Montana. The Rocker facility historically has been used to treat mine framing timbers and utility poles with arsenic. In addition, creosote was used at the Rocker facility and may have been released to the Streamside Tailings Operable Unit by direct discharge or transport of creosote-contaminated fluvial sediment deposits from the Rocker site.

#### IV. CONCLUSIONS OF LAW

Based on the preceding Findings of Fact and the administrative record, the State of Montana, acting by and through DHES, has made the following Conclusions of Law:

A. Respondent is a "Person" as that term is defined by §§ 1-1-201(1)(b) and 75-10-701(9), MCA.

B. Silver Bow Creek, including all real property adjacent to the creek where Hazardous or Deleterious Substances have come

to be located, is a "Facility" as that term is defined in § 75-10-701(4)(a) or (b), MCA.

C. Respondent owned some of the property contaminated with Hazardous or Deleterious Substances, and is the successor-in-interest to the generators of a substantial portion of the Hazardous or Deleterious Substances which have come to be located in and along Silver Bow Creek.

D. The Respondent is, and is hereby notified that it is found to be, a liable Person under § 75-10-715(1), MCA.

E. Arsenic, lead, copper, cadmium, zinc, pentachlorophenol, creosote, dioxin, furan, polynuclear aromatic hydrocarbons and diesel fuel constituents are Hazardous or Deleterious Substances as that term is defined in § 75-10-701(6), MCA.

F. There have been Releases of Hazardous or Deleterious Substances at the Facility, and there exists a substantial threat of continued and future Releases of Hazardous or Deleterious Substances at the Facility that DHES has reason to believe may present an imminent and substantial endangerment to the public health, welfare, or safety or the environment.

G. The information and remedial action required by this Consent Order are necessary and appropriate to identify the existence, nature, origin, and extent of the Release or the threat of Release and the extent and imminence of the danger to public health, welfare, safety, or the environment.

## V. DETERMINATIONS

A. Based on the Findings of Fact and Conclusions of Law set forth above, the State of Montana, acting by and through DHES and in consultation with EPA, has determined that the actions required by and undertaken pursuant to this Consent Order are necessary to protect the public health and welfare and environment, are in the public interest, are consistent with the NCP and State requirements, and are appropriate remedial actions to contain, remove and abate the past Release of Hazardous or Deleterious Substances and presently continuing Releases and threatened Releases of Hazardous or Deleterious Substances into the environment at and from the Facility.

B. The Respondent is qualified to perform the actions set forth in this Consent Order properly and expeditiously.

## VI. STATEMENT OF PURPOSE

The objective of DHES and the Respondent is for the Respondent to conduct, with DHES oversight, an RI/FS consistent with CERCLA, the NCP, CECRA and this Consent Order, to assess Facility conditions in order to identify the nature and extent of

contamination and evaluate ecological and human health risks, and to evaluate alternatives to the extent necessary to select an appropriate remedy for contamination at the Facility.

#### VII. TERMS AND CONDITIONS OF CONSENT

A. Respondent completely and voluntarily waives its rights to, and agrees not to:

1. appeal the issuance of this Consent Order;
2. challenge the jurisdiction (or the essential facts which create jurisdiction) or authority of DHES to enforce this Consent Order;
3. contest the validity or enforceability of any and all provisions, terms, and conditions of this Consent Order including the Work Plan and any Supplemental Work Plans adopted pursuant hereto, except as provided for by paragraph I of Section XXI.

B. Subject to the provisions of paragraph A of this Section VII, nothing in this Consent Order shall be construed as an admission of liability by Respondent nor as a limitation, restriction or waiver of any arguments or challenges which Respondent may have regarding the proper interpretation or construction of the provisions, terms and conditions of this Consent Order and attachments hereto.

C. Moreover, Respondent's agreement to comply with the provisions, terms and conditions of this Consent Order does not constitute an admission or acknowledgment of the facts asserted or implied herein. This Consent Order shall not operate as an admission by Respondent as to any factual assertion or legal conclusions outside of the context of proceedings to interpret or enforce this Consent Order. Respondent specifically does not admit or acknowledge the Findings of Fact or Conclusions of Law contained in Sections III and IV above, except to the limited extent noted in Subsection A, above.

#### VIII. PARTIES BOUND

All Parties are bound by the terms of this Consent Order. Respondent agrees that no change in ownership or corporate status shall in any way alter the status or responsibility of the Respondent under this Consent Order. Respondent shall be responsible for carrying out all actions required of Respondent by the terms and conditions of this Consent Order. Respondent shall be responsible for insuring that all Contractors, consultants, firms and other persons or entities acting on behalf of Respondent with respect to matters included herein will comply with the terms of this Consent Order.

## IX. NOTICE

In accordance with the provisions of § 75-10-711, MCA, DHES hereby notifies Respondent and Respondent hereby acknowledges notice that Respondent is a person determined by DHES to be liable under § 75-10-715(1), MCA, for the Release(s) or threatened Release(s) of Hazardous or Deleterious Substances from the Facility. Moreover, Respondent is hereby notified by DHES that the Work required by this Consent Order, the Work Plan and any Supplemental Work Plans is "appropriate remedial action" with regard to the Releases or threatened Releases at the Facility. Respondent is hereby notified, pursuant to § 75-10-711(3)(c), MCA, that it may be required to reimburse the Fund for the costs of remedial action, including enforcement costs, litigation costs, attorneys' fees and expert witness fees, incurred by DHES in implementing, or in compelling Respondent to implement appropriate remedial action, following its failure or refusal to do so, and Respondent may be subject to penalties pursuant to § 75-10-715(3), MCA.

## X. ORDER

NOW, THEREFORE, RESPONDENT AGREES, AND DHES HEREBY ORDERS RESPONDENT, pursuant to §§ 75-10-711 and 75-10-715, MCA, and CERCLA § 107, to fully and timely comply with all of the terms, conditions and requirements of this Consent Order.

## XI. DEVELOPMENT AND EXECUTION OF WORK PLAN

A. Respondent is ordered and agrees to conduct an RI/FS for the Facility pursuant to the terms of this Consent Order. The Respondent shall conduct the RI/FS in accordance with CERCLA, the National Contingency Plan (NCP), applicable EPA RI/FS guidance (identified in Attachment 3, attached and incorporated herein) and applicable state law and regulation. The Respondent shall conduct the RI/FS in accordance with the attached Streamside Tailings RI/FS Work Plan. The attached Work Plan is hereby incorporated into this Consent Order as an enforceable part hereof (Attachment 1). The Respondent shall also conduct the RI/FS in accordance with the specific activities and schedules for conducting the RI/FS Work set forth in the attached schedule, Attachment 2.

B. The activities conducted under this Consent Order are subject to approval by DHES and must be sufficient to provide all necessary information for the RI/FS and for a record of decision that is consistent with CERCLA, the NCP and CECRA.

C. DHES reserves the right to comment on, modify, and direct changes for all deliverables as described in this paragraph. When DHES comments on or directs changes to deliverables, the following procedures shall apply:

1. Respondent must fully correct all deficiencies and incorporate and integrate all information and comments, as directed by DHES, within fourteen (14) Days of receipt of DHES' comments, unless a different time period is specified in the Schedule set forth in Exhibit 2 or the Work Plan.

2. Respondent may request, and DHES shall grant within seven Days of receipt of DHES' comments, a meeting to discuss any comments or directions from DHES. If DHES agrees that its comments or directions are incorrect or should be modified, Respondent may resubmit the deliverable in accordance with DHES' decision. DHES shall document any such decision by sending a letter stating which comments are incorrect or should be modified, within three (3) Days of the meeting.

3. At the time any revised deliverable is submitted, Respondent shall submit a cover letter describing how each substantive DHES comment was addressed and describing any additional substantive changes or additions in the resubmittal along with a justification for those changes or additions. The cover letter shall also include a certification that no substantive changes other than those identified in the cover letter or in a red-line draft were made. Failure to address any EPA comments or directions as described in this paragraph, or failure to identify additional substantive changes or additions is a violation of this Consent Order.

4. If Respondent disagrees with the substantive changes required by DHES, Respondent may include a disclaimer in a separate cover letter identifying the portion(s) of such documents with which the Respondent disagrees and the reasons for the disagreement. Whenever and to whomever the document is disseminated, DHES agrees to include such cover letter with the deliverable. Such cover letter shall be included in the Administrative Record for the Site pursuant to Section XIII. An example of such disclaimer is attached to this Consent Order as Exhibit 3.

D. If Respondent fails to comply with subsection C above, or if DHES determines that additional changes or additions were included in a resubmittal without identification, DHES retains the right to seek stipulated penalties, as described in Section XX, or statutory penalties, to perform its own studies, or to complete the deliverable or any portion thereof and seek reimbursement from Respondent for its costs. To the extent that DHES conducts or takes over some of the Work, Respondent shall incorporate and integrate information supplied by DHES into the final RI/FS. In that event, the preparer of the final RI/FS shall include a statement indicating which portions of the RI/FS were prepared by DHES.



E. DHES may also choose to enforce the terms of this Consent Order and compel the Respondent to produce the final RI/FS consistent with the comments of DHES.

F. Neither failure of DHES to expressly approve or disapprove Respondent's submissions within a specified time period, nor the absence of comments, shall be construed as approval by DHES.

G. The Parties agree and acknowledge that the development and performance of a Remedial Investigation (RI) and Feasibility Study (FS) will be conducted through the retention and direction of Contractors, in accordance with sound scientific, engineering and construction practices and shall be consistent with all applicable federal and state laws and regulations. The Respondent has provided DHES with information concerning the technical qualifications of the primary engineering and/or consulting firm and its principal person in charge who have been designated by the Respondent to conduct the RI/FS activities required by this Consent Order. DHES has determined that Respondent's Contractors are qualified to undertake the performance of the RI/FS. For any change by the Respondent in the primary engineering and/or consulting firm or its principal person in charge, the Respondent shall reaffirm this ability to carry out the task by notifying DHES in writing of the name(s) of the engineering and/or consulting firm(s) who will be responsible for carrying out the Work under this Consent Order, and the principal person in charge of conducting the Work for each such firm to be used in carrying out such work.

H. DHES, in consultation with EPA, shall prepare all necessary draft and final risk assessments, public health evaluations, and analyses of "Applicable or Relevant and Appropriate" federal and state standards, requirements, criteria and limitations (ARARs) required for the RI/FS work, and provide them to the Respondent in a timely manner for incorporation into the draft and final RI/FS reports. The Respondent may submit a preliminary scoping document addressing human health and environmental risk assessment issues to DHES no later than thirty (30) Days after Respondent's submittal of the 1992 data summary report. The Respondent may submit an ARARs scoping document in accordance with the schedule provided in attachment 2. The Respondent agrees that no formal DHES response to the Respondent's documents is needed before draft DHES documents are published for public comment. DHES shall use best efforts to complete and deliver these reports to the Respondent within the time periods projected for completion and delivery in the RI/FS Work Plan. These projected time periods are estimates and are not binding upon DHES. DHES shall notify the Respondent as early as possible if it intends to complete and deliver the reports before the dates projected in the Work Plan and Schedule, Attachments 1 and 2. In addition, within forty-five (45) Days after Respondent's submittal of the 1992 data summary report, Respondent shall submit a

memorandum to DHES evaluating institutional controls which may be selected for the Streamside Tailings Operable Unit.

I. Respondent shall incorporate the risk assessment, public health evaluation and ARARs analyses prepared by DHES in the draft and final RI/FS reports. Where Respondent disagrees with all or portions of the risk assessment, public health evaluation or ARARs analysis prepared by DHES, such disagreement shall not be expressed in the deliverables themselves. The Respondent shall provide any comments or objections concerning such documents separately, but not later than the close of the public comment period described in Section XXIV. Any comments received from the Respondent, complete with any responses provided by DHES, shall be included in the administrative record.

J DHES and the Respondent will meet on a quarterly basis to discuss implementation of the Work Plan, including sampling, data, and reports. All data, information or reports collected or prepared pursuant to the requirements of this Consent Order and available to Respondent prior to a quarterly meeting must have been provided to DHES at least 15 Days prior to the quarterly meeting. Neither DHES nor Respondent may assert a confidentiality claim with respect to any data in DHES's or Respondent's possession that was generated pursuant to this Consent Order.

K. In the event that subsequent amendments to CERCLA, the NCP, applicable EPA RI/FS guidance, or applicable state laws or regulations are promulgated after the effective date of this Consent Order which materially affect the rights or obligations of either party with respect to the substantive nature of the Work to be performed in the RI/FS, DHES and the Respondent agree to negotiate in good faith an amendment to this Consent Order to provide for such changes.

## XII. ADDITIONAL WORK

A. If additional investigations are determined by DHES to be necessary, DHES shall prepare a Supplemental Scope of Work and request in writing that the Respondent develop a Supplemental Work Plan for the additional Work as soon as possible and no later than thirty (30) Days after such notification, and request in writing that the Respondent perform the additional Work. The Supplemental Scope of Work shall specify the basis and reasons for determining that additional Work is necessary. Prior to delivery of a Supplemental Scope of Work to the Respondent, DHES shall provide the opportunity for a scoping meeting to discuss the form and substance of the Supplemental Scope of Work. The Respondent shall respond in writing to the request for additional Work, and if Respondent agrees to undertake the additional Work, a Supplemental Work Plan shall be prepared by the Respondent and submitted to DHES for review and comment. DHES shall provide one round of comments to Respondent which will be incorporated into the Supplemental Work Plan unless the dispute resolution process found in Section XXI is

invoked. The Supplemental Work Plan developed for that additional Work shall, upon approval by DHES, be attached to and shall be deemed incorporated into this Consent Order.

B. If the Respondent does not agree to perform the additional Work and/or does not prepare an acceptable Supplemental Work Plan, it shall provide its rationale in writing. DHES shall respond in writing to the Respondent's comments. If DHES and Respondent cannot agree on the additional Work within thirty (30) Days of Respondent's receipt of DHES's response, the dispute shall be subject to the dispute resolution process in Section XXI. The Respondent hereby agrees to perform any additional Work within the scope of the original Work Plan which is determined, pursuant to the dispute resolution process, to be necessary. Any failure by the Respondent to perform additional Work within the scope of the original Work Plan shall be deemed to be a violation of this Consent Order. Any failure by the Respondent to perform additional Work outside the scope of the original Work Plan shall not constitute a violation of this Consent Order. As used in this Section, "the scope of the original Work Plan" shall mean the investigation, for the purposes expressed in Section VI, above, of contamination associated with the Facility, the approximate boundaries of which are shown in the Work Plan (Attachment 1).

C. If the Respondent does not perform the additional Work required of it following the conclusion of the dispute resolution process, it may be subject to statutory penalties for each Day it fails to comply with the requirements of this Consent Order. In addition, DHES reserves the right to conduct the RI/FS activities described in the Supplemental Scope of Work and/or pursue any other actions authorized by applicable state or federal law.

### XIII. SITE ACCESS AND SAMPLING

A. Respondent agrees to permit the State and EPA and their authorized representatives to have unrestricted access to portions of the Facility that may be owned or controlled by Respondent which are either impacted by Releases or utilized to conduct any activities required by this Consent Order. Such grant of access shall be for the purpose of conducting, overseeing and inspecting any and all activities which have been or are being conducted, or overseeing and inspecting conditions which are addressed under or impacted by the activities required to be undertaken pursuant to this Consent Order. Nothing herein shall limit or restrict any statutory inspection, site access, or sampling authorities vested in the State or EPA by applicable federal or State law.

B. The Respondent hereby consents to observation by State and EPA representatives at any time during the performance of Work required under, performed in connection with, or undertaken in furtherance of the purposes of this Consent Order. The Respondent consents to the State and EPA taking samples or split samples on

any property owned or controlled by Respondent which is part of the Facility at any time.

C. The Respondent shall notify DHES and EPA not less than seven (7) Days in advance of any sample collection activity to be conducted by the Respondent or its representatives for the purposes of this RI/FS, as expressed in Section VI. Upon the request of DHES or EPA, the Respondent shall provide split or duplicate samples to DHES and EPA of any samples collected by or on behalf of the Respondent, provided that a sufficient quantity of materials to be sampled are available on the day of sampling. The procedures for collecting such split or duplicate samples will be the procedures set forth in the Quality Assurance Project Plan (QAPP) for the Silver Bow Creek site, set forth as Attachment 5.

D. To the extent access to property owned by third parties is required in order for the Respondent to carry out the requirements of this Order, Respondent agrees to and shall use its best efforts to obtain access for itself and the State and EPA. Any agreement must allow the Parties to sample or monitor environmental media, including the right to split samples, on property owned by third parties pursuant to the requirements of the Consent Order and attached Work Plan. Such site access agreements shall generally be in the form included as Attachment 7 to this Consent Order. DHES shall, consistent with Federal or State authority, obtain access for the Respondent if the Respondent provides documentation to DHES demonstrating that it has used its best efforts to obtain access on its own and failed to obtain access. The Respondent agrees that it will reimburse DHES for all expenses not inconsistent with the NCP which DHES incurs or becomes liable for in gaining access for the Respondent, at the request of the Respondent, and will indemnify DHES as provided in Section XXV of this Consent Order.

E. When working on property owned by third parties, the Respondent shall provide the opportunity for the third party to request and obtain a split sample. The Respondent shall document that such an opportunity was provided.

F. DHES and EPA shall notify the Respondent, orally or in writing, not less than seven (7) Days in advance of any sample collection activity conducted by or on behalf of the State or EPA for the purposes of this RI/FS, as expressed in Section VI. Upon the request of the Respondent, the State and/or EPA shall provide split or duplicate samples to the Respondent of any such samples, provided that a sufficient quantity of the materials to be sampled is available on the day of sampling. The procedures for collecting such split or duplicate samples will be the procedures set forth in the Quality Assurance Project Plan (QAPP) for the Streamside Tailings Operable Unit, set forth as Attachment 5.

#### XIV. COMPLIANCE WITH OTHER LAWS

All actions carried out by the Respondent pursuant to this Consent Order shall be done in full compliance with all applicable federal, State and local laws and regulations. The Respondent shall be responsible for obtaining all federal, State or local permits which are necessary for the performance of any Work hereunder. To the extent legally permissible, DHES agrees to exempt all remedial actions conducted entirely on site pursuant to this Consent Order from State and local administrative or procedural permit requirements, if necessary to complete the requirements of this Consent Order in a timely fashion. In the letter included in this Consent Order as Attachment 8, EPA has determined that the Work activities conducted on site are exempt from Federal, State and local administrative or procedural permit requirements as provided by Section 121(e) of CERCLA, if they are conducted in compliance with this Consent Order and the NCP.

#### XV. QUALITY ASSURANCE/QUALITY CONTROL

A. The Respondent shall comply with all approved quality assurance, quality control, and chain of custody procedures and requirements as they pertain to all sampling as set forth in the Sampling and Analysis Plan (SAP), the Quality Assurance Project Plan (QAPP) and the Laboratory Analytical Protocol (LAP) established under this Consent Order.

B. In order to provide quality assurance and maintain quality control with respect to all samples collected pursuant to this Consent Order, the Respondent shall:

1. Arrange for access for DHES and its authorized representatives, upon reasonable notice to Respondent and during regular business hours, to any laboratories and personnel utilized by the Respondent for analyses;

2. Ensure that all sampling and analyses are performed according to the methods set forth in the Sampling and Analysis Plans (SAPs) attached and incorporated herein as Attachment 6, the QAPP and the LAP established under this Consent Order;

3. Ensure that any laboratories utilized by the Respondent for analyses prepare and maintain adequate documentation of compliance with the requirements described in XV.B.2 (above) and that such documentation be made available to DHES and the Respondent upon request;

4. Ensure that any laboratories utilized by the Respondent for analyses participate in a quality assurance/quality control program equivalent to that which is followed by EPA under CERCLA. As part of such a program, and upon request by DHES, such laboratories shall perform such

analyses of samples provided by DHES as are necessary to demonstrate the quality of each laboratory's analytical data.

5. If Respondent utilizes a laboratory which participates in EPA's Contract Laboratory Program, paragraphs 1 and 4 of this Section XV shall be inapplicable.

#### XVI. PROJECT COORDINATORS AND REPORTING

A. On or before the effective date of this Consent Order, the Respondent shall designate one or more Project Coordinators and alternate Project Coordinators. The DHES Project Coordinator will be Neil Marsh, and the alternate Project Coordinator will be Karen Zackheim. The EPA Project Coordinator will be Mike Bishop, and the alternate Project Coordinator will be Bob Fox. The Project Coordinator for the Respondent will be David Sinkbeil. The alternate Project Coordinator for the Respondent will be Sandra Stash. Each Project Coordinator shall be responsible for overseeing the implementation of this Consent Order. To the maximum extent practicable, communications between the Respondent and DHES, and all documents, reports, approvals, and other correspondence concerning the activities performed pursuant to or required by the terms and conditions of this Consent Order, shall be directed through the Project Coordinators. If the Project Coordinator is unavailable, such information shall be directed through the alternate Project Coordinator. During implementation of the Work Plans and any Supplemental Work Plans, the Project Coordinators shall, whenever possible, attempt in good faith to resolve disputes informally through discussion of the issues.

B. DHES and EPA and the Respondent shall each have the right to change their respective Project Coordinators, alternate Project Coordinators, and attorneys or the addresses to which documents or notices are to be sent. Such a change shall be accomplished by notifying the other Parties in writing as soon as possible after making the change.

C. The DHES Project Coordinator shall have, and may exercise, the authority vested in DHES by §§ 75-5-621 and 75-10-712, MCA. In addition, he shall have the authority to immediately halt any activities at the Streamside Tailings Operable Unit which are being or may be undertaken pursuant to this Consent Order, which violate, threaten to violate, or which cause or threaten to cause, a public nuisance or a violation of any requirements of applicable federal or state law, this Consent Order, or a Work Plan or Supplemental Work Plan established under this Consent Order.

D. When DHES's Project Coordinator takes action under paragraph XVI.C, he may orally direct a substantive change not inconsistent with the NCP to the requirements of the Work Plan. Such a change shall be followed up in writing by the DHES Project Coordinator within three (3) business days of the oral direction. "Substantive change," for the purposes of this paragraph, shall be

defined as any change that contradicts the written language in the Work Plan attached hereto, and any Supplemental Work Plans, provided, however, that any substantive change which substantially increases the cost to, or obligations of, the Respondent, other than substantive changes to address emergency conditions, shall be proposed as Additional Work under Section XII of this Consent Order. Such direction shall be subject to dispute resolution after receipt of written notice specified above, unless covered under the conditions described in Section XXI.J. Once a final determination has been made pursuant to the dispute resolution process described in this Consent Order, the Parties agree to incorporate such change into this Consent Order by written amendment. Any substantive change ordered by DHES's Project Coordinator which affects the Schedule of activities set forth in Attachment 2, shall be treated as a force majeure event pursuant to Section XVII of this Consent Order. If dispute resolution procedures are not initiated within 10 business days of receipt by the Respondent of the written notice referenced in paragraph XVI.D above, the written notice shall be incorporated into this Consent Order as a modification and shall become a fully enforceable part thereof.

E. The absence of the DHES Project Coordinator from the Facility shall not be cause for stoppage of the Work to be performed pursuant to this Consent Order.

F. Except for initial oral notices specified in Sections XVI.D., XVII.B. and XXI.A., all notices given pursuant to this Consent Order shall be given in writing.

G. One copy of all plans, reports, notices and other Work products required under the terms of this Consent Order shall be sent by certified mail, return receipt requested, or equivalent service to each of the following:

Neil Marsh  
Superfund Program  
Bureau of Solid and Hazardous Waste  
Cogswell Building  
Helena, MT 59620

William Kirley, Esq.  
Special Assistant Attorney General  
MDHES, Superfund Program  
Cogswell Building  
Helena, MT 59620

EPA Remedial Project Manager  
Streamside Tailings Operable Unit  
U.S. Environmental Protection Agency  
Region VIII  
Federal Building  
301 South Park  
Helena, MT 59626-0096

EPA Attorney  
Streamside Tailings Operable Unit  
U.S. Environmental Protection Agency  
Region VIII  
Federal Building  
301 South Park  
Helena, MT 59626-0096

H. Copies of all plans, reports, notices and other Work products to be given to ARCO shall be sent to the following address:

Mr. David Sinkbeil  
ARCO  
307 East Park Avenue, Suite 301  
Anaconda, MT 59711

with copies to:

Pam Sbar, Esq.  
ARCO  
555 Seventeenth Street, 16th Floor  
Denver, CO 80202

and

Linda L. Rockwood, Esq.  
Parcel, Mauro, Hultin & Spaanstra, P.C.  
1801 California, Suite 3600  
Denver, CO 80202

I. By the end of each month, Respondent shall provide to DHES and EPA a monthly progress report describing and summarizing site activities during the prior month.

J. By the end of each month, DHES shall provide to Respondent a monthly progress report describing and summarizing all Streambank Tailings and Revegetation Studies ("STARS") activities during the prior month.

K. Monthly progress reports shall identify all field activities, list all sample packages sent to and analytical packages received from laboratories, describe data validation, treatability study, alternative evaluation and report preparation activities, and identify problems encountered, such as access difficulties or delay in data receipt, for the reporting month.

#### XVII. FORCE MAJEURE

A. "Force majeure" for purposes of this Consent Order, including all attachments, is defined as any event arising from causes beyond the control of Respondent and of any entity controlled by Respondent, including its Contractors, that delays



the timely performance of any obligation under this Consent Order notwithstanding Respondent's best efforts to avoid the delay. The requirement that Respondent exercise "best efforts to avoid the delay" includes using best efforts to reasonably anticipate any potential force majeure event and best efforts to address the effects of any potential force majeure event (a) as it is occurring, and (b) following the potential force majeure event, such that the delay is minimized to the greatest extent practicable. Force majeure does not include financial inability to complete the Work. Force majeure may include Acts of God, war, revolution, riots, strikes, fires, or floods. Force majeure shall also include, but is not limited to, delays or failures of governmental agencies in issuing necessary permits or approvals, provided such permits are required and the Respondent has timely submitted complete applications and provided all required information. Such circumstances may also include delays in obtaining access to property of third Parties, provided that the Respondent has made a good faith and timely effort to secure such access, and provided that the Respondent has requested assistance from DHES in a timely manner. Finally, force majeure may include delays, beyond time periods estimated in the Work Plan, by DHES in providing comments or other key documents, provided that the delay shortens the period allowed for the Respondent to comply with a deadline. The Respondent shall bear the burden of proving by a preponderance of the evidence that any failure to comply with the requirements of this Consent Order, the Work Plan or a Supplemental Work Plan is due to force majeure.

B. The Respondent shall notify the DHES Project Coordinator(s) orally, within 48 hours of the time Respondent learns of the circumstances, and shall, within seven (7) Days of oral notification to DHES, notify DHES in writing of the anticipated length and cause of delay, the measures taken and to be taken to prevent or minimize the delay, and the timetable by which the Respondent intends to implement those measures. Oral notification to DHES must occur in no event more than 48 hours after Respondent or Respondent's contractor(s) become aware of the occurrence or event causing the delay or failure in whole or in part. Oral notification to the DHES Project Coordinator, Neil Marsh, or his designee, shall be accomplished by calling (406) 444-1420. After business hours, oral notification to the State Project Office may be to Neil Marsh at (406) 443-7326, Karen Zackheim at (406) 449-6366 or Vic Andersen at (406) 458-5118. Oral notification of the Federal Project Coordinator shall be to Mike Bishop at (406) 449-5414. Failure to timely make the oral and written notifications to DHES required by this paragraph B of any event for which force majeure is claimed shall waive the defense otherwise provided by this paragraph, but only for the event for which notice has not been made.

C. If the Respondent demonstrates to DHES that the delay has been or will be caused by circumstances beyond the control of the Respondent and that it exercised best efforts to prevent the delay, the time for performance for that element of the Work Plan or

Supplemental Work Plan shall be extended for a period equal to the delay. The extension of time may include any reasonable additional time necessary, not to exceed 15 Days, to mobilize manpower or machinery after the elimination of the force majeure event. This shall be accomplished through written notice or through an amendment to this Consent Order, as appropriate. Such an extension does not alter the schedule for performance or completion of other tasks required by the Work Plan or Supplemental Work Plans unless these are specifically altered by amendment of the Consent Order, or unless the Work on those other tasks depends on continued Work on the tasks delayed by the force majeure event. In the event further Work depends on the Work delayed by the force majeure event, the time for performance of the further Work shall be extended only for a period equal to that of the delay caused by the force majeure event and any reasonable additional time necessary, not to exceed fifteen (15) Days, to mobilize manpower or machinery.

D. In the event that DHES and Respondent cannot agree that any delay or failure has been or will be caused by circumstances beyond the control of the Respondent, or if there is no agreement on the length of the extension, the dispute shall be resolved in accordance with the provisions of Section XXI of this Consent Order. If Respondent does not prevail in the dispute resolution pursuant to the dispute resolution process, any stipulated penalties which would apply by operation of Section XX of this Consent Order shall apply during the term of the dispute resolution procedures, as provided for in Section XXI.

E. If the late receipt of DHES comments or documents results in Respondent's inability to comply with a deadline due to inclement weather conditions which substantially adversely affect the specific activity to be performed, DHES and the Respondent agree to negotiate a schedule extension.

#### XVIII. RECORD PRESERVATION AND EXCHANGE

A. The Respondent agrees that it shall preserve during the pendency of this Consent Order and for a period of six (6) years from the date of termination of this Consent Order, all records or documents in its possession or in the possession of its employees, agents, accountants, contractors, or attorneys that relate to the Work performed at the site pursuant to this Consent Order. Upon written request by the State, Respondent shall within twenty (20) Days make all such documents not exempt from disclosure by law available to the State. At the end of this six (6) year period, the Respondent may destroy any such records, but only after notifying DHES at least thirty (30) Days in advance and allowing DHES to inspect and copy any such records. At any time before the end of the six (6) year period, Respondent may discharge its obligations under this Section with respect to documents not exempt from disclosure by law by notifying DHES in writing and providing DHES with originals, if available, or unaltered reproductions or copies in possession of Respondent, of all such reports and documents not

already provided to DHES and not exempt from disclosure by law. If unaltered reproductions or copies are provided, the custodian of the records shall certify that to the best of the custodian's knowledge, the copies were made contemporaneously with the original and that the copies are an accurate reproduction of the original. Thereafter, the records may be destroyed except that the Respondent must preserve all records and documents which the Respondent claims are exempt by law from disclosure for the entire six (6) year period referenced above.

B. All records, documents, raw data, and other information (including, but not limited to, field notes, daily ledgers, diaries, memoranda, and laboratory data validation reports), not otherwise exempt from disclosure by law, which are within the custody or control of Respondent or its Contractors relating to performance of any of the activities required by or undertaken pursuant to this Consent Order, or plans established thereunder, shall be available to DHES for inspection and copying upon notice to the Respondent as provided for herein.

C. Respondent may not assert a confidentiality claim for any data, including raw data, collected pursuant to this Consent Order. Respondent may assert a confidentiality claim for any documents which use or interpret such data.

D. Documents withheld from disclosure under terms of this Consent Order allowing withholding of privileged or confidential documents or documents otherwise exempt from disclosure by law, shall be identified for the other Party, by author, recipient, date of generation, general subject matter and basis for withholding, at the time those documents would otherwise have been required to be produced or disclosed.

E. The Parties agree to negotiate in good faith for an agreement for mutual exchange of data collected by or for either Party outside the requirements of the Work Plan, including data collected in connection with natural resource damage litigation between the Parties, as it would be relevant to the Streamside Tailings Operable Unit RI/FS. Any such agreement between the Parties shall be included and incorporated into this Consent Order.

#### XIX. ADMISSIBILITY OF DATA

A. Except for objections as to relevance, the Parties hereby stipulate to and waive any objection to the admissibility into evidence of the results of any final data generated by the Respondent in the performance of the requirements of this Consent Order. For purposes of this Section, the term "final data" shall be interpreted to mean only analytical data that have been verified and approved by DHES, or verified by the Respondent and approved by DHES, pursuant to the QAPP and the data assessment and data validation plans as being in full compliance with the quality assurance/quality control ("QA/QC") requirements of the QAPP, LAP,

and SAPs in effect at the time the samples were collected. Additionally, except for objections as to relevance, the Parties stipulate to and waive any objection to the admissibility into evidence of final data contained in, or referenced in, reports generated by any of the Parties or their Contractors pursuant to this Consent Order.

B. If DHES determines that analytical data are still usable in the RI/FS (and supporting documents), for certain specific purposes, and QA/QC requirements that were in place at the time the data were gathered were not completely satisfied, or no QA/QC requirements existed, DHES shall identify such data in a written report which describes the acceptable uses for the data, including any limitations on such uses and the reasons why the data may be used for these purposes. DHES shall transmit the report to the Respondent with a request that the Respondent stipulate to and waive any objection as to the admissibility into evidence (with the reservation described above) of the data if offered by the State as evidence in any enforcement proceeding. The Respondent shall respond in writing no later than thirty (30) days following receipt of the report to each issue and data point discussed by DHES. The Respondent shall negotiate in good faith and, if agreement is reached, enter into a written stipulation and waiver concerning the data. If DHES and the Respondent do not agree to a written stipulation covering certain data, the Respondent waives its rights to object to expenditures of funds (either required of Respondent or made by DHES) necessary for the collection of new data to replace that which was not stipulated to; however, Respondent reserves any objections it may have as to the necessity or use of the data not stipulated to or the new data.

C. The Respondent may also submit a report to DHES identifying data that does not fully comply with QA/QC requirements, describing acceptable uses for the data, describing the reasons why it is still usable, and proposing a written stipulation and waiver of the right to raise evidentiary objections in any further enforcement proceeding by the State.

## XX. STIPULATED PENALTIES

A. In the event that the Respondent's completion of the tasks set forth in this Section and called for in the Work Plan is not timely according to the schedule in Attachment 2, and such delay is not excused by operation of Section XVII (Force Majeure) or if the Respondent violates the following provisions of this Consent Order, DHES may assess and Respondent shall pay, by tendering to DHES within ten (10) Days of the Respondent's receipt of a written demand for payment of such penalties, the sum(s) set forth below as stipulated penalties for each stipulated penalty event (i.e., violation, delay, refusal or failure). Stipulated penalties may be assessed for each Day during which such violation, delay, or failure occurs or continues. The demand shall specify

the events giving rise to Respondent's asserted liability for stipulated penalties and the amount of such penalties.

1. For each Day of delay of the delivery of the draft and final sampling and analytical plans, the treatment technology scoping document, the Initial Alternatives Screening Document (IASD report), any treatability study work plan, the draft data summary reports, any treatability study report, the preliminary draft RI/FS report, the final draft RI/FS report, the draft final RI/FS report, and the final RI/FS report, and for each Day of failure to address comments, make modifications, incorporate information, or identify changes in resubmitted deliverables as provided in Sections XI.C and XX.D:

	<u>Amount/Day</u>
Days 1-14	\$ 3,000.00
Days 15-30	\$ 6,000.00
31 or more Days	\$12,000.00

2. For failure to pay the uncontested portion of reimbursable costs on time as specified in Section XXII:

	<u>Amount/Day</u>
Days 1-14	\$ 1,000.00
Days 15-30	\$ 3,000.00
31 or more Days	\$ 6,000.00

3. For each instance of unintentional destruction of a document(s) in violation of Section XVIII (Respondent shall bear the burden of establishing that any destruction was unintentional) :

\$2,500 per instance

4. For each instance of willful destruction of a document under Section XVIII, or failure to comply with the agreement not to contest jurisdiction in Section VII:

\$20,000 per instance

B. DHES hereby finds that the provisions of this Section XX are designed to protect the public health, welfare, safety and environment by achieving a prompt, complete and efficient assessment of the nature and extent of contamination, and the development of a plan for remediation of contamination at the Facility. Stipulated penalties are also integral and essential to DHES's desire that the provisions of this Consent Order be, to the maximum extent achievable, self-executing and self-enforcing. All stipulated penalties not specifically rejected by the dispute resolution process shall be paid on or before the tenth (10th) Day

following final resolution of the dispute pursuant to Section XXI of this Consent Order.

C. DHES may, in its discretion, impose a lesser penalty for minor violations. Any such decision to reduce stipulated penalties otherwise due pursuant to Section XX.A of this Consent Order shall be solely at the discretion of DHES and shall not be subject to dispute resolution.

D. Stipulated penalties shall begin to accrue as of the date of receipt by Respondent of written notice from DHES specifying the violation of the Consent Order requirement and specifying the applicable penalty provision, provided, however, that prior to imposition of a stipulated penalty for failure to address comments, make modifications, or incorporate information in a resubmitted deliverable, as provided in paragraph 1 of this Section, DHES shall, following the completion of the activities described in Section XI.C, provide notice to Respondent of its determination of the occurrence of such stipulated penalty event and shall specify the failure(s) that constitutes the basis of that determination. If Respondent has not cured the identified defect or failure within five business days of receipt of such notification, stipulated penalties shall begin to accrue upon expiration of that five day period.

E. The check for payment of the stipulated penalties shall be mailed within ten (10) Days of Respondent's receipt of a written demand for payment. Payment of stipulated penalties to DHES pursuant to this Section XX shall be by check, made payable to the order of "State of Montana, Department of Health and Environmental Sciences" and shall contain a notation that it is for stipulated penalties for the Streamside Tailings Operable Unit. The check should be tendered to:

Centralized Services Division  
Department of Health and Environmental Sciences  
Cogswell Building, Room C123  
Helena, MT 59620

A copy of the transmittal letter and check shall be sent to the following address:

William B. Kirley, Esq.  
MDHES, Superfund Program  
Cogswell Building  
Helena, MT 59620

F. If Respondent fails or refuses to comply with the requirements and schedules of this Consent Order, DHES may pursue any other remedy or sanction which may be available to DHES because of the Respondent's failure or refusal to comply with any of the terms of this Consent Order, including, without limitation,

statutory penalties or injunctive relief to enforce the terms of this Consent Order.

G. Delay caused by formal dispute resolution requested by Respondent under Section XXI in which DHES prevails shall not constitute "a circumstance beyond the control of the Respondent" for purposes of being excused from payment of stipulated penalties under Section XVII (Force Majeure).

H. With respect to stipulated penalties, DHES shall have the burden of proving non-compliance, except as specified in Section XX.A.3, and the Respondent shall have the burden of proving the occurrence of a force majeure event.

#### XXI. DISPUTE RESOLUTION

A. In the event of any dispute pertaining to any of the requirements of this Consent order, including the Work Plan and any Supplemental Work Plans, the Parties shall initiate an informal dispute resolution period not to exceed ten (10) Days. During this time period, representatives of DHES and the Respondent shall meet informally to make a good faith attempt to resolve the dispute. At the conclusion of the informal dispute resolution process, DHES shall immediately notify the Respondent orally of its decision. The conclusion of the informal dispute resolution process shall be documented by DHES, and a notice shall be sent to Respondent within three (3) business days of the documented conclusion. Any agreement between the Parties resolving a dispute shall be in writing and made a part of the administrative record. It is understood that neither the Administrator of the Environmental Sciences Division nor the Director of the Department of Health and Environmental Sciences will be present at these meetings.

B. In the event the dispute cannot be resolved through this informal process, the Respondent may submit, on or before the tenth (10th) Day after conclusion of the informal dispute resolution process, a notice describing the nature of the dispute to the Administrator of the Environmental Sciences Division. This notice shall include all arguments and authority, both statutory and common law, and other facts and conclusions upon which the Respondent relies in support of its position.

C. Any dispute or argument in support of a dispute not submitted to the Administrator of the Environmental Sciences Division within this ten-Day period shall be waived.

D. Within ten (10) Days following receipt of the aforementioned notice to DHES, the Administrator of the Environmental Sciences Division shall schedule and hold an informal hearing addressing the subject matter of the dispute. The Administrator of the Environmental Sciences Division or his duly designated representative shall attempt to schedule the informal hearing for a time which is convenient to the Parties. DHES shall



notify in writing the Respondent of the time and place of the informal hearing. This hearing shall take place before the Administrator or his duly designated representative and shall be transcribed or recorded. At this informal hearing, all Parties may present their respective arguments and any evidence in support of their position. The Administrator of the Environmental Sciences Division or his duly designated representative shall then consider all arguments and all evidence submitted and shall render a written decision upon the dispute within seven (7) Days of the informal hearing.

E. In the event the Respondent does not agree with the decision of DHES, it may appeal, in writing within five (5) Days of its receipt of the decision, to the Director of the Department of Health and Environmental Sciences. At this time, the Respondent can request, and the Director may, in his discretion, schedule a meeting with the Respondent and representatives of DHES, at which time all Parties may make an oral presentation of their respective positions. It is to be understood, however, that this meeting is to be scheduled solely at the discretion of the Director, and nothing in this Section entitles the Respondent to such a meeting as a matter of right. Only those arguments and positions originally presented at the informal hearing before the Administrator will be considered at this appeal stage. The Director shall render a written decision within seven (7) Days of the appeal following receipt of the request from the Respondent. In the event the Director decides to hold a meeting as provided above, the period for rendering a written decision may be extended for an additional seven (7) Days; however, no stipulated penalties shall accrue during that period. The decision of the Director shall be final and shall become part of the Administrative Record.

F. In the event the Administrator or his duly designated representative fails to render a written decision within the time period stated in paragraph XXI.D or the Director fails to render a written decision within the time period stated in paragraph XXI.E, stipulated penalties shall be tolled for each Day that such written decision is delayed.

G. Any stipulated penalties which arise out of or are the subject of the dispute resolution shall accrue during the dispute resolution period, unless tolled by paragraph XXI.E or XXI.F. In the event this process ends in favor of the Respondent, no stipulated penalties shall be due for that particular violation. In the event this process ends in favor of DHES, all penalties shall be immediately due and owing and shall be paid by Respondent in accord with the procedures set forth in paragraph XX.E, unless DHES finds that the Respondent's position was substantially justified. If it is found that the Respondent's position was substantially justified or that the Respondent acted in good faith in advancing an event as a force majeure, then DHES may forgive part or all of the stipulated penalties incurred. Such a decision shall be solely at the discretion of the Director.



H. In the event the dispute resolution process ends in favor of DHES, the Respondent understands and agrees to reimburse DHES for all costs incurred by DHES because of the utilization of this resolution process. These costs shall include but are not limited to costs incurred by the State through the utilization of their own employees, attorneys, laboratories or scientific studies.

I. The Respondent may not challenge provisions of this Consent Order to which it has already agreed by resorting to these dispute resolution procedures, except that a good faith dispute as to interpretation of the Consent Order shall be subject to such procedures. Implementation of these dispute resolution procedures shall not provide the basis for any schedule extension for any activities required in this Consent Order unless DHES agrees in writing to a scheduled extension.

J. The Director of the Department of Health and Environmental Sciences shall have authority to suspend these dispute resolution procedures for activities at the Streamside Tailings Operable Unit during any period in which an immediate action is required to prevent an imminent and substantial threat to public health, welfare or the environment. In the event of such a suspension, any stipulated penalties otherwise accruing shall be tolled until Respondent's receipt of notification of resumption of the dispute resolution process.

## XXII. REIMBURSEMENT OF COSTS

A. The Respondent agrees to and shall reimburse DHES for remedial action costs incurred by the State or its Contractors after the effective date of this Consent Order and for all the Streambank Tailings and Revegetation Studies ("STARS") work (as provided in paragraph D below) which are consistent with the scope of DHES's role and responsibilities under this Consent Order and which are not inconsistent with the NCP. After the end of each calendar quarter during which this Consent Order is in effect, DHES may submit an accounting, including all applicable documentation, to the Respondent covering these remedial action costs, not covered by EPA funding, incurred by the State in connection with, or arising out of, its response to Releases or threatened Releases from the Facility after the effective date of this Consent Order. However, DHES agrees not to seek, solely on the basis of this Consent Order, cost recovery for implementation of a remedy, as defined by CERCLA Section 101(24), 42 U.S.C. § 9601(24). DHES's accounting shall itemize State costs incurred subsequent to the effective date of this Consent Order which have not been covered by funding provided by the EPA through a cooperative agreement, and shall include, at a minimum, the following information: the names, titles, and hourly rates of State employees and retained legal counsel, direct labor and other direct charges; indirect charges; and State contractor vouchers and/or invoices for Work performed for State activities and oversight related to implementation of

this Consent Order, except for any privileged information contained in such vouchers or invoices.

B. Within thirty (30) Days of receipt of documentation from DHES, the Respondent shall, subject to its right to invoke the provisions in Section XXII.E, reimburse DHES for all such costs which are not inconsistent with the NCP which have not been covered by funding provided by the EPA through a cooperative agreement.

C. Payment to DHES for its costs described in Section XXII.A. shall be by check and shall include a notation that the amount is a contribution to the Environmental Quality Protection Fund. The check shall be made payable to "State of Montana, Department of Health and Environmental Sciences" and shall be tendered to: Centralized Services Division, Montana Department of Health and Environmental Sciences, Cogswell Building, Room C123, Helena, Montana 59620. The contributions should be identified as being for the Streamside Tailings Operable Unit. Copies of all payments to DHES shall be provided at the time of such payment to: William B. Kirley, Esq., MDHES, Legal Division, Cogswell Building, Helena, Montana 59620.

D. The Parties agree to negotiate in good faith for an agreement for reimbursement and provision of funds by Respondent for STARS work to be conducted by or for DHES. Any such agreement between the Parties shall be included and incorporated into this Consent Order.

E. If the Respondent concludes that DHES has made an accounting error, has not included the documentation described in paragraph A. above, or has included remedial action costs that are not recoverable under this Consent Order, it may contest payment by notifying DHES of these conclusions, together with the facts and arguments upon which Respondent relies to support its conclusions, in writing within thirty (30) Days of receipt of the accounting. Any objection to the State's remedial action costs or supporting argument not made within that time is waived. Following receipt of the Respondent's objections and supporting arguments, DHES and the Respondent shall then have thirty (30) Days to resolve their differences. If agreement cannot be reached within the 30-Day period, the State reserves all rights it has to bring an action against Respondent under applicable federal or state law, to recoup all recoverable costs as set forth in the accounting, together with allowable interest and damages and penalties, not reimbursed by the Respondent. Respondent reserves its right to contest all such claims.

F. If the Respondent contests payment of any of the State's remedial action costs included within an accounting submitted pursuant to paragraph A. of this Section XXII and such costs are subsequently found to be due and owing DHES, the Respondent may be liable to DHES for damages in an amount of two (2) times the amount of the remedial action costs in dispute, plus two (2) times the

costs incurred in bringing such suit, including attorneys' and expert witness fees and expenses.

G. The State reserves all rights it has to recover all past remedial action costs and any future costs incurred by the State in connection with investigation, remedial or response activities at the Facility pursuant to applicable federal and state law (including state common law).

H. For purposes of paragraphs A. through F., inclusive, of this Section XXII, the term "remedial action costs" shall include:

1. all costs of all activities included within the definitions of the terms "removal," "remedial action," and "response" in CERCLA Sections 101(23), (24) and (25), respectively, 42 U.S.C. §§ 9601(23), (24) and (25), which are consistent with the NCP; and

2. all costs that fall within the definition of remedial action costs as defined in § 75-10-701(15), MCA, which are consistent with the NCP.

#### XXIII. RESERVATION OF RIGHTS

A. The State reserves the right to conduct other investigations and activities at the Facility. Subject to Section XXXI, nothing herein shall preclude the State from undertaking any additional enforcement action it may deem necessary for any purpose, including the prevention or abatement of an imminent and substantial danger to health, welfare or the environment arising from site conditions. The State further retains all rights against Parties not privy to this Consent Order which may arise out of the facts on which this Consent Order is based. Notwithstanding compliance with the terms of this Consent Order, the Respondent is not released from liability for any actions for which the Respondent is otherwise liable under law.

B. DHES reserves the right to take appropriate enforcement action, including the right to seek injunctive relief, monetary penalties, and all other appropriate relief available, pursuant to all applicable federal or state statutory and common law, for any violation, failure, or refusal to comply with this Consent Order. In addition, if the Respondent fails to remedy noncompliance with this Consent Order in a timely manner, DHES may, after notification to the Respondent, initiate State-funded response actions and may subsequently pursue cost recovery against Respondent, including actions for punitive damages.

C. Nothing herein shall be construed to release the Respondent from any liability for failure of the Respondent to perform the required activities in accordance with the requirements of this Consent Order, the Work Plan and Supplemental Work Plans. The Parties further expressly recognize that this Consent Order and

the successful completion of activities required by this Consent Order and plans established thereunder does not represent satisfaction, waiver, release of, or covenant not to sue (except as provided in Section XXXI) with regard to any claim of the State of Montana against the Respondent relating to the Facility (including, without limitation, claims to require the Respondent to undertake further response actions, claims to seek reimbursement of response costs not reimbursed under the terms of this Consent Order, and claims for natural resource damages).

D. Respondent retains all rights to claim contribution as permitted by CECRA and CERCLA against any person. Nothing in this Consent Order is intended to create any private causes of action in favor of any person not a Respondent.

E. Respondent denies any and all legal or equitable liability under any federal or state statute, regulation, ordinance or common law for any response costs, damages or other liability caused by or arising out of conditions at or arising from the Facility except as agreed to in Section VII. Except as provided in paragraph VII.A., XX.A., XXI.I., and this paragraph, Respondent specifically denies all Findings of Fact, Conclusions of Law and Determinations or any other allegations contained in this Consent Order and attachments thereto and such allegations, findings, conclusions of law and determinations shall not be used in any other proceeding by the State, other than proceedings to enforce this Consent Order or proceedings to recover State remedial action costs if Respondent fails to perform this Consent Order. This Consent Order shall not create in any third party any rights which would not otherwise exist; nor shall this Order be relied upon by third parties to assert a cause of action or claim against Respondent. Nothing in this Consent Order shall preclude, however, the Respondent from using this Consent Order, or the fact of its entry, against any person for contribution or for recovery of costs expended in complying with this Consent Order, except as specifically waived in this Consent Order.

F. No payment made by Respondent to pay for and implement the Work or any other activities required under this Consent Order, other than payment of stipulated penalties, shall be deemed to be a fine, penalty, or monetary sanction.

#### XXIV. PUBLIC COMMENT AND COMMUNITY RELATIONS

A. Within ten (10) Days of the date of signature of this Consent Order by the Respondent, DHES shall announce the availability of this Consent Order to the public for review and comment. DHES shall accept comments from the public for a minimum of thirty (30) Days after such announcement. At the end of the

comment period, DHES, in consultation with EPA, shall review all such comments and shall either:

1. determine that this Consent Order should be made effective in its present form, in which case the Respondent shall be so notified in writing; or

2. determine that modification of this Consent Order is necessary, in which case the Respondent will be informed in writing as to the nature of all changes deemed necessary by DHES. If the Respondent agrees to the modifications, the Consent Order shall be so modified. In the event that the Respondent does not agree to modifications required by DHES as a result of public comment, the dispute as to the modification shall be submitted to the Director of the Department of Health and Environmental Sciences. However, no modification to this Consent Order shall be made except by agreement of the Parties. In the event that the Respondent does not agree to modifications required by DHES, this Consent Order shall be null and void.

B. The Respondent shall cooperate with DHES in providing feasibility study information to the public. Upon the reasonable request of DHES, the Respondent shall participate in the preparation of all appropriate information disseminated to the public and in public meetings which may be held or sponsored by DHES to explain activities at the Streamside Tailings Operable Unit or the Silver Bow Creek Site.

#### XXV. INDEMNIFICATION

A. The Respondent agrees to indemnify and save and hold harmless the State of Montana, its agencies, departments and employees acting in their capacity as regulatory agencies overseeing actions required by this Consent Order from any and all claims or causes of action arising from, or on account of, acts or omissions of the Respondent, its agents, or assigns, in carrying out the activities performed pursuant to this Consent Order, provided that such claims or causes of action did not also arise from the negligence or wrongful acts of the State of Montana, its agents, departments, or employees. Notwithstanding the preceding sentence, Respondent agrees to indemnify and save and hold harmless the State of Montana, its agencies, departments and employees acting in their capacity as regulatory agencies overseeing actions required by this Consent Order from any and all claims or causes of action arising from or on account of actions of the State in obtaining access to property owned by third parties pursuant to paragraph XIII.D. of this Consent Order.

B. For purposes of this Section only, the phrase "claims or causes of action" shall be deemed to include, but not be limited to all claims of officers, agents, and employees of the State for personal injury or property damage.

#### XXVI. DISCLAIMERS

No Party shall be held as a party to any contract entered into by another Party or its employees, agents, or contractors in carrying out activities pursuant to this Consent Order. In addition, no Party shall be liable for any injuries or damages to persons or property resulting from acts or omissions of another Party or its employees, agents or contractors in carrying out the activities pursuant to this Consent Order.

#### XXVII. NOTICE OF RIGHT TO CLAIM CONFIDENTIALITY OF BUSINESS INFORMATION

The Respondent may, if it desires, assert a business confidentiality privilege covering part or all of the information requested by this Consent Order by obtaining a declaratory judgment from a court of competent jurisdiction or label the information as confidential pursuant to § 75-10-707(8), MCA, or Rule 16.44.1008 of the Administrative Rules of Montana. A label of confidentiality is subject to acceptance by DHES. If no such designation or judgment accompanies the information when it is received by DHES, DHES may make it available to the public without further notice to the Respondent. This provision shall not limit any other claims of privilege by Respondent with respect to documents or information exempt from disclosure by law.

#### XXVIII. ADMINISTRATIVE RECORD

A. DHES shall assist EPA in maintaining the administrative record for the Streamside Tailings RI/FS, including documents generated as a result of this Consent Order, and the Respondent agrees to cooperate with DHES and EPA in the preparation of the administrative record. DHES, in consultation with EPA, has determined that the administrative record shall include, but not be limited to, all documents and data submitted by the Respondent pursuant to this Consent Order, all correspondence between DHES and

the Respondent relating to implementation of this Consent Order, and all documents described in EPA's Administrative Record Guidance (Attachment 3). The administrative record shall also include, but not be limited to, all correspondence between EPA and DHES as provided under CERCLA, the NCP, and applicable EPA guidance.

B. Notwithstanding the preceding sentence, DHES and EPA reserve the right to protect from disclosure to the Respondent and the public any documents and communications claimed by DHES or EPA to be privileged under applicable federal and State law. A list of confidential documents included in the administrative record shall be maintained in the administrative record available to the public.

#### XXIX. SUBSEQUENT MODIFICATION AND EFFECTIVE DATE

This Consent Order may be amended by the mutual agreement of DHES, in consultation with EPA, and the Respondent. Such amendments shall be in writing and shall be effective as of the date the amendment is signed by DHES.

In the event DHES, in consultation with EPA, determines that this Consent Order should be made effective in its present form following public comment, the effective date shall be the date on which Respondent receives written notice pursuant to Section XXIV. In the event that this Consent Order is modified by agreement of DHES and the Respondent following public comment, the effective date of such modified Consent Order shall be the date on which it is signed by DHES.

#### XXX. CONTRIBUTION PROTECTION

The Respondent shall not be liable to other persons or entities for contribution claims regarding the Work required by or costs covered by this Consent Order, pursuant to Section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2) and § 75-10-719(1), MCA.

#### XXXI. COVENANT NOT TO SUE

So long as Respondent is performing the Work required by this Consent Order and is in compliance with the terms of this Consent Order, DHES covenants not to sue, issue any order or take other administrative or judicial action, or assert any claim against Respondent with respect to the Work. Such covenant not to sue will only apply during the performance of the requirements of this Consent Order. However, nothing in this section, or in this Consent Order, shall limit the State's ability to respond to an imminent and substantial endangerment to public health, welfare, safety or the environment.

#### XXXII. TERMINATION AND SATISFACTION

This Consent Order shall terminate when the Respondent certifies that all activities required under this Consent Order have been performed (the "Certification"), and DHES, in consultation with EPA, has accepted the Certification. DHES shall accept or reject the Certification by the Respondent within six (6) months of submittal of the Certification of the Respondent. Sections VII, XVIII, XIX, XXII, XXIII, XXV, XXVI, XXX and this Section shall survive termination of this Consent Order. If DHES accepts the Certification, Respondent shall not be liable for any additional investigation of the Facility unless, subsequent to the Certification:

1. conditions at the Facility, previously unknown to DHES, are discovered; or

2. new information is received by DHES, in whole or in part, and DHES, based upon these previously unknown conditions or this new information determines that the Remedial Investigation/Feasibility Study is not adequate to choose a remedy which is protective of public health, welfare or safety, or the environment. In the event such a determination is made by DHES, a written opinion shall be prepared by DHES which sets forth all factual information, analytical data and previously unknown conditions upon which DHES may rely in determining that the RI/FS is not adequate. The written opinion shall be made part of the administrative record. This Section XXXII shall in no way affect the right of the State to respond to an imminent and substantial endangerment to public health, welfare, safety or the environment.



XXXIII. AUTHORITY OF SIGNATORIES

Each of the signatories of this Consent Order states that he or she is fully authorized to enter into the terms and conditions of this Consent Order and to bind legally the Party represented by him or her to the Consent Order.

IT IS SO AGREED:

ARCO

\_\_\_\_\_  
Date

\_\_\_\_\_  
C. F. George  
Manager  
Rocky Mountain Environmental  
Remediation  
ARCO  
On behalf of the Atlantic  
Richfield Company

STATE OF \_\_\_\_\_)

COUNTY OF \_\_\_\_\_)

ss.

Before me appeared \_\_\_\_\_ on behalf of ARCO, this \_\_\_\_\_ day of \_\_\_\_\_ 1991, who states and acknowledges that he is an authorized officer of the company and has authority to sign the foregoing Administrative Order on Consent on behalf of ARCO, and does so of his own free will.

WITNESS my hand and official seal.

(Notarial Seal)

\_\_\_\_\_  
Notary Public  
Residing at: \_\_\_\_\_  
My commission expires: \_\_\_\_\_

IT IS SO ORDERED:

STATE OF MONTANA  
DEPARTMENT OF HEALTH AND  
ENVIRONMENTAL SCIENCES

\_\_\_\_\_  
Date

\_\_\_\_\_  
DENNIS IVERSON, Director  
Department of Health and  
Environmental Sciences

Attachment 1

Attachment 1 (the Work Plan) is bound in a separate volume.

STREAMSIDE TAILINGS RI/FS SCHEDULE

Activity	Schedule <sup>1</sup>
ARCO conducts Spring, 1991 surface water sampling	May, June 1991
ARCO submits Draft Quality Assurance Project Plan ("QAPP"); Draft Data Validation/Data Management Plan ("DVDMP"); and ARCO Comprehensive Safety and Health Program Manual	90 days after ARCO receipt of Special Notice Letter, or at the time of the Good Faith Offer, whichever is later.
ARCO submits Draft Work Plan	60 days after ARCO receipt of Special Notice Letter, or at the time of the Good Faith Offer, whichever is later
[MDHES provides Comments on the Draft Work Plan]	[15 days after receipt of the Draft Work Plan from ARCO]
ARCO submits Final Work Plan	15 days after receipt of MDHES comments on the Draft Work Plan, or at the time that ARCO signs the AO, whichever is later
ARCO submits Draft 1991 Sampling and Analysis Plans ("SAPs") and Cultural Resources Assessment Plan	90 days after ARCO receipt of Special Notice Letter, 30 days after the Good Faith Offer, or at the time that the Administrative Order on Consent ("AO") is signed by ARCO, whichever is latest
Final Potentially Protected Resources (PPR) Report (Floodplains/Wetlands Assessment Report and the Threatened and Endangered Species Report); Draft Historical Data Assessment Report ("HDAR")	90 days after ARCO receipt of Special Notice Letter, 30 days after ARCO Good Faith Offer, August 15, or at time the AO is signed by ARCO, whichever is latest

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<sup>1</sup>The schedule date will be whichever date is later (latest) unless noted otherwise.



MDHES and Federal and State trustees comment on and approve PPR report	30 days after receipt
[MDHES reviews and submits comments to ARCO on draft LAP, QAPP, DVDMP, HDAR, and 1991 field program SAPs]	[30 days after receipt of ARCO submittals]
ARCO submits Response to Comments and Final LAP, QAPP, DVDMP, HDAR, and 1991 field program SAPs, as necessary	21 days after receipt of MDHES comments
[MDHES approves Final LAP, QAPP, DVDMP, HDAR, and 1991 field program SAPs, as necessary]	[15 days after receipt of final documents from ARCO]
[Public Comment Period on Work Plan and Administrative Order on Consent ("AO") opens]	[Upon ARCO signature of the AO]
[Public Comment Period ends]	[30 days after the Public Comment Period opens]
[Effective Date of the AO ("EDOAO") and Final Work Plan approval, and MDHES completes Responsiveness Summary]	[30 days after the close of the Public Comment Period or at time of MDHES approval of 1991 SAPs]
ARCO begins 1991 field sampling program and submits Final Cultural Resources Report	15 days after MDHES approval of LAP, QAPP, DVDMP, HDAR, and 1991 SAPs; or 15 days after the EDOAO, or 5 days after review of the PPR report, whichever is latest
[MDHES and EPA provide Preliminary List of ARARs - chemical and location specific]	[120 days after EDOAO]
ARCO submits ARARs Scoping Document	30 days after ARCO receipt of MDHES comments on the DOAR or 90 days after ARCO receipt of MDHES/EPA preliminary ARARs, whichever is later



ARCO submits preliminary 1991 data and Preliminary Site Characterization Information ("PSCI")

[No MDHES response is expected for the preliminary data or PSCI]

ARCO submits Draft Data Summary/Validation/Useability Reports ("DSRs") for the 1991 field sampling program. [Note that the DSRs will correspond directly to the SAPs.]

[MDHES provides Comments on the 1991 DSRs]

ARCO submits Response to Comments and Final 1991 DSRs

[MDHES approves Final 1991 DSRs]

ARCO submits Draft SAPs for the 1992 field sampling program

[MDHES reviews Draft 1992 SAPs and provides ARCO comments]

ARCO submits Response to Comments and 1992 SAPs

[MDHES approves 1992 SAPs]

1992 Annual Meeting

ARCO submits Draft 1992 SAP amendments and Draft Work Plan Amendment

February 15, 1992, or 30 days before the 1992 Annual Meeting, whichever is earlier

30 days after completion of data assessment for the data represented by each 1991 SAP [Data assessment shall be completed within 45 days of ARCO receipt of final data packages from lab.]

[30 days after receipt of 1991 DSRs]

21 days after receipt of MDHES comments on the 1991 DSRs

[15 days after receipt of Final 1991 DSRs from ARCO]

30 days after completion of data collection of 1991 data, but no later than December 31, 1991

[30 days after receipt of Draft 1992 SAPs from ARCO]

21 days after receipt of MDHES Comments on the Draft 1992 SAPs

[15 days after receipt of 1992 SAPs from ARCO]

March 15, 1992, or 30 days after receipt of preliminary 1991 data and the PSCI, whichever is earlier

30 days after 1992 Annual Meeting





[MDHES reviews 1992 SAP amendments and the Draft Work Plan Amendment and provides comments to ARCO]

ARCO submits Response to Comments and the Final 1992 SAP amendments and Final Work Plan Amendment

[MDHES approves 1992 SAPs and Work Plan amendments]

ARCO starts 1992 field sampling program

Fall 1992 meeting to discuss 1992 sampling and assess any additional data needs in 1993, as practicable. The schedule for developing 1993 SAP, if necessary, to be agreed upon based on prior season schedule.

ARCO submits preliminary 1992 data and the 1992 PSCI

[No MDHES comments are expected for this submittal]

ARCO submits 1992 Draft DSRs

[MDHES reviews and provides Comments on the 1992 Draft DSRs]

ARCO submits Response to Comments and Final 1992 DSRs

[MDHES approves Final 1992 DSRs]

1993 Annual Meeting

[30 days after receipt of the Draft 1992 SAP amendments and the Draft Work Plan Amendment]

21 days after receipt of MDHES Comments on the Draft 1992 SAP amendments and the Draft Work Plan Amendment

[15 days after receipt of Final 1992 SAPs from ARCO]

15 days after MDHES approval of the 1992 SAPs or SAP amendments, or as weather permits; whichever is latest

No later than December 15, 1992

February 15, 1993, or 30 days before the 1993 Annual Meeting, whichever is earlier

30 days after data assessment of the applicable 1992 data

[30 days after receipt of the Draft DSRs from ARCO]

21 days after receipt of MDHES's Comments on the Draft DSRs

[15 days after Receipt of Final 1992 DSRs]

March 15, 1993, or 30 days after receipt of preliminary 1992 data and PSCI, whichever is earlier



ARCO submits Health and Environmental Risk Assessment Scoping Document	30 days after ARCO assessment of the 1992 data
ARCO submits Institutional Controls Legal Memorandum	45 days after ARCO submittal of 1992 DSRs
[MDHES provides the Attorney General's ("AG's") response on Institutional Controls Legal Memorandum, if possible.]	[90 days after receipt of the Institutional Controls Legal Memorandum]
ARCO submits examples of draft site-specific institutional controls legal instruments	120 days after receipt of the AG's and CA's Opinion on the Institutional Controls Legal Memorandum, or 60 days after ARCO submittal of the IASD, whichever is later
ARCO submits 1991-93 Demonstration Project Plan ("DPP")	30 days after MDHES receipt of HDAR
ARCO submits Draft Treatment Technology Scoping Document ("TTS")	Submit with DPP.
[MDHES provides Comments on the DPP and TTS]	[30 days after receipt of Draft DPP and TTS from ARCO]
ARCO submits Response to Comments and the Final DPP and TTS	21 days after receipt of MDHES Comments
[MDHES approves Final DPP and TTS]	[15 days after receipt of Final DPP and TTS from ARCO]
ARCO starts Demonstration Project	15 days after approval of the Final DPP
ARCO submits Demonstration Project Report ("DPR")	30 days after assessment of all demonstration project data and cost analyses, or August 31, 1993; whichever is earlier
[MDHES reviews and provides Comments to ARCO on the Draft DPR]	[30 days after receipt of the Draft DPR]
ARCO submits Response to Comments and Final DPR to MDHES	21 days after receipt of MDHES Comments



[MDHES approves Final DPR]	[15 days after receipt of Final DPR from ARCO]
[MDHES completion of the Streamside Tailings and Revegetation Study ("STARS")]	[No later than MDHES approval of the Final DPR]
ARCO submits Draft Remedial Action Objectives Report ("RAOR") and Draft Development of Alternatives Report ("DOAR")	15 days after submittal of the 1991 PSCI and preliminary 1991 data
[MDHES provides comments on the Draft RAOR and DOAR]	[30 days after receipt of the Draft RAOR and DOAR, or 15 days after the 1992 Annual Meeting, whichever is later]
ARCO submits the Final RAOR and DOAR and Response to Comments	21 days after receipt of MDHES comments on the Draft RAOR and DOAR
[MDHES approves the Final RAOR and DOAR]	[15 days after receipt of the Final RAOR and DOAR from ARCO]
ARCO submits the Draft Initial Alternatives Screening Document ("IASD")	30 days after MDHES approval of the DPR; and 30 days after MDHES Final STARS report is provided to ARCO; 60 days after MDHES approval of the Final RAOR and DOAR; 30 days after ARCO receipt of AG's response on Institutional Controls Legal Memorandum; 30 days after ARCO receipt of the Preliminary List of ARARs; or 30 days after MDHES receipt of the 1992 DSRs; whichever is latest
[MDHES reviews the IASD and provides Comments]	[45 days after receipt of Draft IASD]
ARCO provides Response to Comments and the Final IASD	30 days after receipt of MDHES Comments on the Draft IASD
[MDHES approves IASD]	[15 days after receipt of the Final IASD from ARCO]



[MDHES provides Final Risk Assessment ("RA")]	[90 days after receipt of the Final 1992 (or Phase II RI) DSRs]
[MDHES/EPA provide Detailed Analysis of ARARs]	[60 days after MDHES receipt of the 1992 Draft (or Phase II RI) DSRs, or the Draft IASD, whichever is later]
ARCO submits Preliminary Draft RI/FS	30 days after MDHES approval of the Final DSR (Phase II DSR, if applicable); 30 days after MDHES approval of the Final IASD; 30 days after ARCO receipt of Detailed Analysis of ARARs; or 30 days after ARCO receipt of the Final RA; whichever is the latest
[MDHES reviews the Preliminary Draft RI/FS and provides ARCO comments]	[45 days after receipt of the Preliminary Draft RI/FS]
ARCO submits the Final (Public) Draft RI/FS and Response to MDHES Comments	30 days after receipt of MDHES comments on the Preliminary Draft RI/FS
[Public Comment Period]	[30 days]
[MDHES prepares Responsiveness Summary and Comments on the Final Draft RI/FS]	[30 days]
ARCO submits Draft Final RI/FS and Response to Comments, as appropriate	45 days after receipt of MDHES Comments on the Final Draft RI/FS
[MDHES provides Comments on the Draft Final RI/FS]	[30 days after MDHES receipt of Draft Final RI/FS]
ARCO submits Final RI/FS	30 days after receipt of MDHES Comments on the Draft Final RI/FS

<sup>1</sup>The schedule date will be whichever date is later (latest) unless noted otherwise.





### Attachment 3

#### **GUIDANCE DOCUMENTS**

U.S. EPA. March 8, 1990. 40 CFR Part 300. National Oil and Hazardous Substances Contingency Plan; Final Rule.

U.S. EPA. October 1988. Guidance for Conducting Remedial Investigations and Feasibility Studies under CERCLA. Interim Final. OSWER Directive No. 9255.3-01.

U.S. EPA. December 1987. Compendium of Superfund Field Operations Methods. OSWER Directive 9355.0-14, EPA/540/P-87/00/a (also called Compendium).

U.S. EPA. August 1988. CERCLA Compliance with Other Laws Manual. Draft. OSWER Directive 9234.1-01.

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U.S. EPA. November 1986. Test Methods for Evaluating Solid Wastes, 3rd Ed. (SW-846).



Attachment 4

MODEL DISCLAIMER

ARCO submits the attached [name of report] with revisions to section(s) \_\_\_\_\_ on pages \_\_\_\_\_, which were made at the direction of DHES over ARCO's objections.



## Attachment 5

Attachment 5 (the Quality Assurance Project Plan) will be incorporated as a separate volume when finalized.





Attachment 6

Attachment 6 (the Sampling and Analysis Plan) will be incorporated as a separate volume when finalized.



Attachment 7

**ACCESS AGREEMENT**

\_\_\_\_\_, ("Owner") and **Atlantic Richfield Company ("ARCO")** enter into this Access Agreement ("Agreement") this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_.

1. ARCO has entered into an Administrative Order on Consent with the State of Montana ("State"), to conduct a Remedial Investigation/Feasibility Study for the Streamside Tailings Operable Unit of the Silver Bow Creek/Butte Area Site.

2. Access to property owned by Owner as described in Exhibit A is needed to conduct certain work required by the Consent Order as described in Exhibit B.

3. Owner agrees to permit ARCO to conduct such work on Owner's property.

Therefore, in the mutual interest of Owner and ARCO in furthering the protection of public health and the environment, including the benefits to Owner's property,

Owner and ARCO further agree as follows:

1. **GRANT OF ACCESS.** Owner hereby grants to ARCO and the State, including the authorized representatives of each, the right to enter Owner's real property, as described in Exhibit A, which is attached hereto and incorporated herein by reference (the "Property"), to conduct activities required by the Consent Order, including without limitation, monitoring and sampling (or to receive split samples) of environmental media and conducting other information gathering activities such as field investigating, data collection, installation of monitoring wells and soil borings, surface water and groundwater sampling, surveys, testing, and periodic monitoring (collectively referred to as "Work") as further described in Exhibit B, which is attached hereto and incorporated herein by reference. Owner warrants and represents to ARCO that, to the best of Owner's knowledge, Owner possesses ownership interests in the Property sufficient to grant access to ARCO to conduct the Work. ARCO will make every reasonable effort to minimize any inconvenience to Owner during its Work on the Property, and will work closely with Owner to address any concerns Owner may have about the Work.

2. **INDEMNIFICATION OF OWNER.** ARCO agrees to indemnify and hold harmless Owner from any and all actions, claims, damages, losses, liabilities, or expenses, including damage to property or for loss of use of property, ("liabilities") which may be imposed on or incurred by Owner as a result of ARCO's negligent, reckless or willful acts or omissions while on the Property, except to the extent that such liabilities result from the acts or omissions of Owner. Provided that the Work is conducted without negligence by ARCO, Owner and ARCO agree that the Work conducted pursuant to this Agreement shall not give rise to a claim for indemnification under this provision.



3. COVENANT NOT TO SUE. Except for the indemnification as provided in Paragraph 2 of this Agreement, Owner covenants not to sue ARCO for, and hereby releases ARCO from, any liability for any actions, claims, damages, losses, expenses, or any other liabilities, including but not limited to damages to property or for loss of use of property, arising out of or related to the Work, provided that the Work is conducted without negligence by ARCO.

4. NOTICE. ARCO shall provide Owner, either in writing or verbally, with at least 24 hours notice prior to first commencing the Work on the Property.

All written notices pertaining to this Agreement shall be sent to Owner and ARCO at the respective addresses below. Either Owner or ARCO may designate a different address for receipt of notice by providing written notice of such change to the other.

TO ARCO: ARCO  
307 E. Park Avenue, Suite 301  
Anaconda, MT 59711

Attention: \_\_\_\_\_

TO OWNER: \_\_\_\_\_  
\_\_\_\_\_

5. RESTORATION OF PROPERTY. Upon completion of the Work, ARCO will use its best efforts to return the Property to the condition it was in at the time ARCO first entered the Property under this Agreement, provided such restoration is not inconsistent with the Work conducted pursuant to this Agreement.

6. SAMPLES. ARCO agrees to use its best efforts to provide, upon Owner's prior written request, a portion of any sample taken on Owner's Property, provided that a sufficient quantity of the materials to be sampled are available on the day of sampling, and provided further that the sampling requirements of ARCO and the State are satisfied. Upon the request of Owner, ARCO shall provide Owner with the results of any sampling ARCO performs on the property, after compliance with required quality assurance procedures. A "SAMPLE REQUEST" form is attached as Exhibit C for Owner's use in requesting either: (1) a portion of any sample taken from the property; or (2) a report of the results of that sampling.



7. MISCELLANEOUS.

a. Effect of Agreement. This Agreement and the rights and obligations created hereby shall be binding upon and inure to the benefit of Owner and ARCO and their respective assigns and successors in interest.

b. Negation of Agency Relationship. This Agreement shall not be construed to create, either expressly or by implication, the relationship of agency or partnership between Owner and ARCO. Neither Owner nor ARCO is authorized to act on behalf of the other in any manner relating to the subject matter of this Agreement.

c. Termination. Except with respect to paragraphs 2, 3 and 7.a of this Agreement, this Agreement will terminate thirty (30) days following ARCO's written notification to Owner that the Work is complete.

d. Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of Montana.

e. Construction. The invalidating or unenforceability of any provision of this Agreement shall not affect the validity of enforceability of any other provision.

f. Entire Agreement. This Agreement embodies the entire agreement of Owner and ARCO with respect to the subject matter hereof, and no prior oral or written representation shall serve to modify or amend this Agreement. This Agreement may be modified only by a written agreement signed by Owner and ARCO.

IN WITNESS WHEREOF, Owner and ARCO have executed this Agreement effective as of the date first written above.

\_\_\_\_\_

By: \_\_\_\_\_

Title: \_\_\_\_\_

ATLANTIC RICHFIELD COMPANY

By: \_\_\_\_\_

Title: \_\_\_\_\_





**EXHIBIT C**

**SAMPLE REQUEST**

I, the undersigned, am the owner, his legal representative, or otherwise control the Property (and water well, if applicable) described herein. I have granted access to ARCO, the State, and their respective representatives to enter the Property and to take samples of environmental media from the Property.

I hereby request that ARCO provide to me:

- (1) \_\_\_\_\_ a portion of any sample taken by ARCO from the Property;
- (2) \_\_\_\_\_ a report of the results of that sampling.

**PLEASE CHECK ONE OR BOTH OF THE ABOVE.**

I understand that, after a sample portion is provided to me, the handling, the storage and any analysis of that sample portion, or costs for the same, are my responsibility.

Signature of person making request (if made on behalf of another person or company, please identify that party also):

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date

\_\_\_\_\_  
Print Name

The address at which the requesting party may be contacted and/or the sample portion delivered:

\_\_\_\_\_  
\_\_\_\_\_

**PLEASE RETURN ONE EXECUTED ORIGINAL OF THIS ENTIRE ACCESS AGREEMENT, INCLUDING THIS SAMPLE REQUEST FORM, IN THE SELF-ADDRESSED, STAMPED ENVELOPE TO:**

Atlantic Richfield Company, Attention: \_\_\_\_\_  
\_\_\_\_\_

C:\WP50\SDO\AGMTS\PSOILS.AGT



Attachment 8

D R A F T

Ref: 8RCMO

William B. Kirley, Attorney  
State of Montana  
Department of Health and  
Environmental Sciences  
Cogswell Building  
Helena, Montana 59620

Re: Permit Exemption for RI/FS Activities at the  
Silver Bow Creek/Butte Area (original portion)  
Superfund Site, Streamside Tailings Operable Unit

Dear Mr. Kirley:

Section 121(e)(1) of CERCLA, 42 U.S.C. § 9621(e)(1), states that

No Federal, State, or local permit shall be required for the portion of any removal or remedial action conducted entirely onsite, where such remedial action is selected and carried out in compliance with this section.

Pursuant to section 104(d) of CERCLA, 42 U.S.C. § 9604(d), the State of Montana received cooperative agreement money to require responsible parties to conduct remedial investigation and feasibility study (RI/FS) activities at the Streamside Tailings operable unit of the Silver Bow Creek/Butte Area (original portion) Superfund Site, near Butte, Montana. EPA has reviewed the administrative order on consent issued for this action, and the attached work plan describing the planned RI/FS work, and has approved of those documents.

Accordingly, by this letter, EPA invokes the section 121(e)(1) permit exemption for the Streamside Tailings operable unit RI/FS activities, as long as those activities are conducted in accordance with the approved consent order, work plan, and the National Contingency Plan, 40 CFR Part 300.

Sincerely,

D. Henry Elsen  
Assistant Regional Counsel

NOTE: EPA will provide a final version of this letter when the Streamside Tailings RI/FS Consent Order becomes effective.

